Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No 95-116
Telephone Number Portability	)	RM 8535
	)	

COMMENTS OF DAVID L. KAHN

David L. Kahn
c/o Bellatrix International
4055 Wilshire Blvd., Suite 415
Los Angeles, CA 90010
(213) 736-5600

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I.

INTRODUCTION.

These comments are submitted on behalf of David Kahn, who owns and/or controls several 900 information provider and/or service bureau companies[1].

While TIA's 900 Portability Petition has been proceeding through the FCC, the largest national 900 carrier, AT&T, (with approximately 70% of the national 900 market) has continued their six year old policy of illegally "tying" their provision of 900 MultiQuest billing and collection services to their 900 MultiQuest tariffed transport services for each particular 900 telephone number.

Applicable law prohibits AT&T's illegal "tying" practices. However, the commentator believes that no other person has litigated AT&T's illegal "tie-in" of AT&T's 900 billing services to AT&T's 900 transport services for the same 900 numbers because of (i) the economic power of AT&T, which has a net worth of more than $15,000,000,000, (ii) AT&T's 70% share of the national 900 market, and (iii) AT&T's ability to destroy any service bureau and/or

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1. Three of these companies have had to institute litigation against AT&T in order to vindicate their rights against AT&T, including the right to continue to have 900 tariffed transport services on the same 900 telephone numbers once AT&T's billing services on those 900 numbers are terminated. As a result of a preliminary injunction motion by the plaintiff against AT&T in one such lawsuit, when AT&T sent a Billing Services Agreement termination letter to one of those companies on September 7, 1995, AT&T made a temporary, limited exception to AT&T's standard policy and agreed: "However, in light of court proceedings, transport services to ...[the IP] shall continue to be provided at this time on the 900 numbers previously assigned." (Emphasis added.) See Exhibit C to Kahn Declaration.

information provider's business by terminating without cause, upon thirty days notice, 900 billing services to such company, and at the same time terminating that company's single most valuable asset, its existing 900 numbers;

These comments request on behalf of all information providers and service bureaus that 900 number portability be made fully effective as soon as possible because of the following continuing anticompetitive evils caused by AT&T's illegal "tying" of their 900 MultiQuest billing services for a particular 900 number to AT&T's transport services for that same 900 number:

1. AT&T refuses to provide tariffed transport services on the same 900 telephone numbers after the termination, by either party, of billing services on those 900 numbers; even though AT&T knows that the 900 numbers are a part of AT&T's 900 tariffed transport services pursuant to § 5.4.3. A. of AT&T's Tariff No. 1.

2. Notwithstanding AT&T's knowledge of the applicable law [such as the FCC's prior decision Matter of Investigation of Access & Divestiture Related Tariffs, 97 F.C.C.2d 1082 (1984)] that tariff provisions, such as § 5.4.2.E. of the AT&T Tariff No. 1 are unenforceable, AT&T filed and/or maintained a Tariff for 900 MultiQuest services which states:

> "Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right to any AT&T MultiQuest Service 900 telephone number."

3. Notwithstanding AT&T's knowledge of the applicable law that § 5.4.3. A. of AT&T's Tariff No. 1 supersedes and controls 900 MultiQuest tariffed transport services (including the 900 number),

AT&T's enforces its standard Billing Services Agreement ("BSA") provisions; which are legally unenforceable because they are overridden by § 5.4.3. A. of AT&T's Tariff No. 1, and by the Federal Communications Act. Namely, AT&T enforces Sections 8.G. and 9. (or Sections 7.E. and 6. of AT&T's newer version) of AT&T's standard BSA which provide:

> "8.G. The Premium Billing Arrangement for MultiQuest Dial-It 900 Service provided for in this agreement will automatically terminate if Network Services [i.e., tariffed transport services] are not subscribed to for a period of ninety (90) days...
>
> 9...upon termination of this [billing services] Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

4. Notwithstanding AT&T's knowledge that the FCC "detariffed" AT&T's Dial-It 900 service in part because there supposedly was no "tie-in" between AT&T's billing services and transport services in that case, AT&T "ties" their 900 MultiQuest billing services to AT&T's transport services for the same 900 numbers.

II.

AT&T'S ILLEGALLY TIES ITS 900 MULTIQUEST BILLING SERVICES TO ITS 900 MULTIQUEST TARIFFED TRANSPORT SERVICES FOR THE SAME 900 TELEPHONE NUMBERS PURSUANT TO AT&T'S BSA.

AT&T's above referenced BSA provisions mean that all AT&T's 900 BSA customers must use AT&T's transport services (i.e., "Utility" or "Network Services"); then if AT&T's 900 billing services are terminated by either party, for any reason whatsoever, AT&T's 900 customer loses its unique 900 numbers. The practical

effects are obvious. After operations commence, the AT&T 900 information provider cannot elect to use a competitive billing service without losing its 900 telephone numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 information provider's customers to do business with, or to even be able to contact, the information provider ("IP").

AT&T's normal practice upon termination of AT&T's 900 billing services, pursuant to AT&T's illegal exclusive dealing and tying provisions in AT&T's BSA, is to also terminate the IP's unique 900 number(s). Therefore, when AT&T (or the IP) terminates AT&T's 900 billing services upon thirty days notice pursuant to AT&T's BSA, AT&T thereafter refuses to provide tariffed transport services on the same 900 numbers on which AT&T (or the IP) has terminated billing services. At that point in time, AT&T will only provide tariffed transport services to an IP on different 900 numbers. Thus, AT&T will only provide 900 utility services (i.e., transport services) to the IP if the IP gives up its single most important asset, its unique 900 telephone numbers; which typically generate virtually all of the IP's total revenue.

In order for AT&T to terminate the IP's 900 telephone numbers, thereby terminating transport services on the IP's existing 900 telephone numbers, AT&T invokes provisions of AT&T's BSA, which are unenforceable as such provisions (i) are not in the applicable AT&T Tariff No. 1 (which is legally controlling over and supersedes any BSA provision), and (ii) constitute illegal tying and exclusive

dealing arrangements violative of the Federal Antitrust laws and the Federal Communications Act ("Act").

Thus, under paragraph 8.G. of AT&T's BSA, the 900 IP must use AT&T's Network [tariffed transport or utility] services. If an IP uses AT&T's tariffed 900 transport services, the IP must continue to use AT&T billing services on those same 900 numbers, or lose its unique 900 numbers. These are telephone numbers in which the IP, typically will have invested substantial sums. Thus, the effects of these provisions in AT&T's BSA are to "tie" AT&T's tariffed 900 transport services to its 900 billing services, and to prevent AT&T's IP's from utilizing 900 billing services of AT&T's competitors. Antitrust laws deal with "competitive realities." United States v. Masonite Corporation. 316 U.S. 265, 280 (1942).

The effects of these AT&T tying and exclusive dealing provisions in AT&T's BSA are much like the effects of the lease only system found illegal in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), affirmed United Shoe Machinery Corp. v. United States 347 U.S. 521, 74 S. Ct. 699, 99 L.Ed. 910 (1954). In that case once a customer entered into a lease with United Shoe Machinery, it was economically prohibitive to deal with a competitor. A tying agreement or condition "need not be expressly embodied in written agreements. Such arrangements may be deduced from a course of conduct." Associated Press v. Taft-Ingalls Corporation, 340 F.2d 753, 765 (6th Cir. 1965) Cert. den. 382 U.S. 820 (1965).

Eastman Kodak Company v. Image Technical Services, Inc., 112 S. Ct. 2072, 119 L.Ed. 2d 265 (1992), is directly on point. In that case, the plaintiff alleged that Kodak illegally tied the sale of Kodak parts to Kodak service. The U.S. Supreme Court held that customers of Kodak for replacement parts of Kodak equipment stated valid claims against Kodak based on Kodak's refusal to sell them such parts. The Supreme Court held that the plaintiffs stated valid claims for violation of both §§ 1 and 2 of Sherman Act. Kodak contended, as AT&T will probably contend, that because there was competition in its primary market [for Kodak Equipment, as for AT&T's 900 billing services] Kodak could not have monopoly power in the parts market. This argument was rejected, 112 S. Ct. 2072-73. The Supreme Court held that it was a question of fact as to whether Kodak monopolized a market in its own products.

Other cases have held that tying or exclusive agreements violate §§ 1 and 2 of the Sherman Act so long as a "not insubstantial" amount of commerce is involved. Fortner Enter., Inc. v. United States Steel Corp. 429 U.S. 610 (1969); Standard Oil Co. of Cal. v. United States 337 U.S. 293 (1949), Richfield Oil Corp. v. United States, 343 U.S. 922 (1952). See Kodak, supra, at 2079-80.

AT&T has an approximate 70% market share of the estimated $650 million national U.S. 900 market.[2]

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2 Strategic Telemedia, in its July, 1994 Telemedia News and Views newsletter estimated AT&T's 1994 market share would be about 70% of an estimated $650 million dollar national U.S. market. Strategic Telemedia is regularly relied on in the trade for 900 industry statistics. Thus their estimates were accepted by the

AT&T's illegal tying and exclusive dealing provisions in AT&T's BSA deny essential services to the IP. Specifically, after a 900 IP signs an AT&T 900 BSA and agrees to use AT&T's 900 billing services, the 900 IP is tied to AT&T for life if the IP desires to continue to use the specific 900 number(s) on which it has spent considerable monies advertising, and which constitute the only practical way for the IP's customers to do business with, or to contact, the IP.

Thus, if an AT&T 900 IP terminates AT&T's billing services pursuant to AT&T's BSA to use the billing services of a competitor, the IP loses its unique 900 numbers, even though it may have spent large sums in promoting them; and even though the IP's customers have no other practical way of thereafter doing business with, or contacting, the IP. Thus, AT&T becomes the only practical facility after it once signs up a 900 IP. Cf. Eastman Kodak Co v. Image Technical Services, Inc., 112 S.Ct. 2072, 2081-82(1992).

Courts have consistently held that contract provisions which constitute illegal "tie-ins" are unenforceable. Courts have refused to permit a party to benefit from contractual rights when the contract is an instrument of restraint of trade. **Osborn v. Sinclair Refining Co.**, 324 F.2d 566 (4th Cir. 1963); **Wurzberg Brothers, Inc. v. Head Ski Co.**, 276 F.Supp. 142 (D.N.J. 1967). As stated by the Seventh Circuit Court of Appeals in **Milsen Company v.**

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overwhelmingly dominant magazine covering the 900 industry, Infotext, in its 1994 Service Bureau Review issue. See also p.20 of Strategic Telemedia's February, 1994 one-hundred thirty page study of the U.S. Market for 900 Services, which estimates AT&T's 1993 market share at 69%. Exhibit D to Kahn Declaration.

Southland Corporation, 454 F.2d 363, 366-367 (1971):

> "Many courts have held that defendants who are or may be guilty of anticompetitive practices should not be permitted to terminate franchises, leases or sales contracts when such terminations would effectuate those practices. **Semmes Motors, Inc. v. Ford Motor Co.**, 429 F.2d 1197 (2d Cir. 1970); **Sahm v. V-1 Oil Co.**, 402 F.2d 69 (10th Cir. 1968); **Broussard v. Socony Mobil Oil Co.**, 350 F.2d 346 (5th Cir. 1966); **Bergen Drug Co. v. Park Davis & Co.**, 307 F.2d 725 (3d Cir. 1962); **Bateman v. Ford Motor Co.**, 302 F.2d 63 (8d Cir. 1962); **Interphoto Corp. v. Minolta Corp.**, 295 F.Supp. 711 (S.D.N.Y.), aff'd, 417 F.2d 621 (2d Cir. 1963); **Wurzberg Brothers, Inc. v. Head Ski Co.**, 276 F. Supp. 142 (D.N.J. 1967); **Madsen v. Chrysler Corp.**, 261 F. Supp. 488 (N.D. Ill. 1966), vacated as moot, 375 F.2d 773 (7th Cir. 1967); **McKesson and Robbins, Inc. v. Charles Pfizer & Co.**, 235 F. Supp. 743 (E.D.Pa. 1967)....

The IP's 900 tariffed transport services for the IP's particular 900 numbers are protected from termination by AT&T by both AT&T's Tariff No. 1 and the Federal Communications Act.

A. In Order to Enforce AT&T's Illegal "Tying" of AT&T's 900 Billing Services to AT&T's 900 Tariffed Transport Services AT&T Relies Upon Tariff And BSA Provisions Which the FCC and the Courts Have Held to Be Unenforceable.

Whenever AT&T's billing services are terminated, by either party, for any reason whatsoever pursuant to AT&T's BSA, AT&T simultaneously terminates the IP's tariffed transport services on the IP's existing 900 telephone numbers pursuant to the BSA, although AT&T's 900 tariffed transport services (including the 900 number itself) are not governed by the BSA; they are governed exclusively by AT&T's Tariff No. 1 and the Federal Communications Act. Section 4 of AT&T's 900 BSA itself states:

"This Agreement does not govern or affect tariffed services."

AT&T's 900 tariffed transport services are regulated by the Federal Communications Act, which obligates AT&T to provide such services (including the 900 telephone numbers) to the IP in a just

and reasonable manner, and on a nondiscriminatory basis (47 U.S.C. Sections 201, 202(a)), notwithstanding any contrary contract provision in AT&T's BSA, such as the last sentence in Section 9 of AT&T's BSA which purportedly requires the IP to give up its most valuable asset upon termination of the BSA, the IP's unique 900 telephone numbers.

More specifically, the last sentence of Section 9 of AT&T's BSA states in relevant part:

> "9...upon termination of this Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

Thus, upon termination of AT&T's BSA upon thirty days notice, AT&T is willing to continue to provide transport services to the IP, but only if AT&T changes the IP's unique 900 telephone numbers, on which the IP has spent significant amounts of money advertising. AT&T does not, and cannot, contend that AT&T's Tariff No. 1 itself permits AT&T to terminate the IP's 900 telephone numbers, other than for nonpayment of charges.

There is no provision in AT&T's Tariff No. 1 which permits AT&T's "tie-in" practice of terminating transport services for the IP's existing 900 telephone numbers, or the changing (or terminating) of the IP's 900 telephone numbers merely because of the IP's termination, or AT&T's termination, without cause, of billing services for the IP's 900 telephone numbers.

AT&T's Tariff No. 1 cannot be modified by AT&T's BSA or usage. Yet, AT&T for more than six years has regularly and consistently terminated tariffed transport services on the IP's 900 telephone

numbers for a reason not found in AT&T's Tariff No. 1, namely AT&T's termination, without cause, of the IP's BSA, or the IP's termination of AT&T's billing services in order to attempt to take advantage of a competitor's lower 900 billing services prices and/or better service.

But the FCC has ruled, in a similar context, that AT&T cannot terminate tariffed transport services even in the event of a breach of a billing services agreement. In the matter of AT&T Dial-It Services and Third Party Billing and Collection Services, 4 F.C.C. Rcd. No. 9, 3429 (1989), the FCC stated:

> "38. ...Further, we instruct AT&T to take adequate steps to ensure that communications services [i.e., tariffed transport services] to callers are not disconnected for failure to pay Premium Billing charges..."

Thus, even though AT&T does not allege any tariff violation by the IP, upon termination by either party of AT&T's 900 billing services pursuant to AT&T's BSA, AT&T terminates utility (i.e., transport) services on the IP's existing 900 numbers solely because of the termination of billing services pursuant to AT&T's BSA with that IP.

That the carrying of the IP's 900 information services over AT&T's common carrier network (i.e., tariffed transport services) on the IP's particular 900 numbers is a communication service subject to the Act is well settled.

B. The Only Legitimate Reason for AT&T to Terminate Tariffed Transport Services on the IP's Existing 900 Numbers Is Because AT&T Is Not Being Paid for Such Services.

AT&T does not terminate the IP's tariffed transport services on its existing 900 telephone numbers because of any alleged non-

payment of tariff charges; rather AT&T terminates the IP's tariffed transport services simply because AT&T terminates, without cause, the IP's Billing Services Agreement; or the IP terminates billing services pursuant to AT&T's BSA to try to take advantage of a competitor's lower 900 billing services prices and/or better service.

Section 9 of AT&T's BSA provides that while AT&T is providing billing services, AT&T can change 900 numbers when:

> "...such change is necessary to effectively provide Billing Services, including, but not limited to, a change in the Offer(s) or a change in your charges for the Offer(s)."

This may be a reasonable provision in view of AT&T's original (now discontinued) practice of using different telephone prefixes for different billing prices to the caller.

But the last sentence of Section 9 of AT&T's BSA providing for the arbitrary termination of the IP's 900 telephone numbers, thereby terminating transport services to the IP on the IP's existing 900 numbers upon termination of the IP's BSA, can only have an anticompetitive purpose. This purpose does not permit termination of utility (i.e., transport) services to the IP on the IP's existing 900 numbers, as such illegal tying and exclusive dealing provision is unenforceable for the reasons stated herein.

It is anticipated that AT&T will continue to contend, as it currently does in the U.S. District Court in Las Vegas that:

> "Assigning new 900 numbers is different than denying transport services, and there is no provision of the FCA nor any other applicable law relating thereto which establishes that MRO is entitled to retain the use of specific 900 numbers." Page 19, lines 22-28, and page 20, lines 1-28 of Exhibit A to the Kahn Declaration.

However, the assignment of new 900 telephone numbers by AT&T is in effect a subscription to "new" telephone services. It is no different than termination of the IP's existing 900 telephone business and the start-up of a new 900 telephone business.

In effect, AT&T argues that even though AT&T places, without any justification whatsoever, an economically prohibitive penalty on the obtaining of 900 transport services (i.e., termination of the IP's existing 900 numbers), this is not a discontinuation of transport services. In short, AT&T argues that placing a confiscatory condition on the continuation of AT&T's 900 transport services to the IP does not constitute a discontinuation of such transport services.

First, this ignores the fact that the IP's 900 numbers are part of AT&T's transport services for the IP's numbers pursuant to § 5.4.3.A. of AT&T's Tariff; and there is no provision in the Tariff which permits AT&T's termination of the IP's 900 numbers (or transport services thereon), except for non-payment of tariff charges.

Second, it is difficult to imagine a more flagrant ruse by a common carrier in an attempt to avoid its obligations under the Act to provide transport services to the IP (whose 900 numbers generate virtually all of the IP's revenues and are the only practical way for its customers to contact the IP) than to in effect say:

> "Yes, we will continue to provide the IP with 900 transport services, but we will arbitrarily change the IP's 900 numbers, thereby exacting an economically prohibitive penalty; since the only way that the IP will be able to generate revenue, or even be able to have its customers contact the IP, is through the IP's 900 numbers -- which will be arbitrarily terminated!"

It is as if an electric utility would say, "Yes, we will continue to provide you with services, but only at a different address", or only on other conditions which exact such an economically prohibitive penalty as to be equivalent to a denial of services.

Third, since § 5.4.3.A. of AT&T's Tariff explicitly makes the IP's 900 numbers part of AT&T's tariffed transport services, under §§ 201(a) and (b) of the Act AT&T cannot change such numbers unless it is pursuant to a Tariff provision, which is "just and reasonable"; and under § 202(a) of the Act it must also be non-discriminatory.

C. Transport Services for the IP's Particular 900 Telephone Numbers Is a Basic Service Covered by Communications Act.

The FCC has ruled that the provision of 900 transmission (i.e., transport) services, including the assignment of 900 telephone numbers, are basic telephone services subject to the provisions of Title II of the Communications Act. Matter of AT&T 900 Dial-It-Services & Third Party Billing & Collection Services, 4 F.C.C. Rcd. No. 9 (1989). In Dial-It, the FCC held that AT&T Dial-It 900 Information Arrangement service provides sponsor/subscribers with transmission (i.e., transport) services and, thus, properly is characterized as a basic service subject to the Act. Id. at 3434. Thus, the IP's receipt of transmission (i.e., transport) services for its 900 telephone numbers are basic services subject to the provisions of the Communications Act.[3]

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[3] The FCC segregated the provision of 900 service into two distinct elements. The transport of the message and provision of the telephone number remain subject to traditional common carrier obligations. In

D. AT&T's Tariff Provides That the IP's 900 Numbers Are Part of AT&T's 900 Transport Services.

AT&T is required under its Tariff No. 1 to provide 900 tariffed transport services to the IP, including the IP's particular 900 telephone numbers. The IP's 900 numbers are part of AT&T's tariffed transport services. The IP's 900 telephone numbers are provided through the Tariff, not AT&T's BSA. In fact, AT&T's Tariff No. 1 explicitly includes a 900 number as part of AT&T's 900 tariffed transport service. More specifically, § 5.4.3.A. of AT&T's Tariff No. 1 states:

> "The monthly charges for AT&T MultiQuest Service apply per Service Arrangement. The Service Arrangement is a combination of network hardware and software programming which provides the capability for calls to a Customer's 900 number to be routed to a Customer-designated AT&T Central Office. Each Service Arrangement includes one 900 number and one Routing Capability." (Emphasis added)

Therefore, since the IP is entitled to 900 transport services, and since the IP's 900 numbers are part of those tariffed transport services, it necessarily follows that pursuant to the Tariff the IP is entitled to 900 transport services, including the IP's 900 numbers, upon termination of AT&T's billing services on those 900 numbers; notwithstanding any contrary provision in Section 9 of AT&T's BSA.

Thus, the IP's actual 900 telephone numbers are part and parcel of AT&T's common carrier communication (i.e., transport)

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contrast, the actual billing and collection of the charges for calls to 900 numbers was de-tariffed by the FCC and left to be governed by private contract only because in that case AT&T did not "tie" them together for the same 900 telephone numbers! See Dial-It at 3434.

service because the IP's 900 telephone numbers are assigned through the Tariff, not the BSA. AT&T's MultiQuest 900 Tariff No. 1 has other provisions dealing with 900 telephone number changes, such as (i) "once a 900 number has been disconnected by the Customer, it will be unavailable for use for six months, unless waived by the previous Customer" (Section 5.4.1), and (ii) the nonrecurring charge for changing a 900 telephone number is $175 (Section 5.4.3). But, there is no provision in AT&T's Tariff No. 1 which permits AT&T to change an IP's 900 telephone number simply because the IP terminates, or AT&T terminates, without cause, billing services for such 900 numbers!

E. All Acts by AT&T, As a Common Carrier, Must Be Just and Reasonable, Regardless of Any Contrary AT&T BSA or AT&T Tariff Provision.

The language of § 5.4.2.E. of AT&T's Tariff No. 1 that a customer has no "....interest or proprietary right to any...900 telephone number...." does not mitigate the Federal Communications Act's requirement that AT&T, as a common carrier, must act in a "just and reasonable" manner pursuant to 4 U.S.C. Section 201(b).[4]

Indeed, when challenged, the FCC has held that the burden of proof is upon the carrier to justify restrictions in a tariff as being just and reasonable under Section 201. Tariffs are not presumed to be in compliance with the Act simply because they are filed and effective. The FCC does not review and approve all

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4 The U.S. Supreme Court long ago held, "the Act requires the filed tariffs to be 'just and reasonable' and declares that otherwise they are unlawful." Ambassador v. United States, 325 U.S. 317, 323 (1945).

tariffs in advance. Rather, the FCC authorizes the carriers to file tariffs which are subject to review for lawfulness in the event of a challenge by a subscriber to the service.[5]

Thus, simply because AT&T's MultiQuest 900 tariff No. 1 declares that the IP allegedly has no proprietary interest in a 900 number does not ipso facto result in AT&T's Tariff No. 1 complying with the Federal Communications Act, and certainly is not a basis upon which to terminate the IP's particular 900 numbers for an unjust and unreasonable cause. AT&T's termination of the IP's existing 900 telephone numbers simply because the IP terminates, or AT&T terminates, without cause, billing services pursuant to AT&T's BSA constitutes an unjust and unreasonable practice under the Act.[6] Certainly, AT&T's Tariff does not permit AT&T to terminate the IP's 900 transport services on the IP's 900 numbers based on the fact that the IP terminated, or AT&T terminated, without cause, billing services for the same 900 telephone numbers -- nor, it is submitted could it under Section 201(b) of the act.

F. AT&T's Termination of an IP's Unique 900 Telephone Numbers Merely Because AT&T's 900 Billing Services Are Terminated Is Not "Just and Reasonable" As Required by Section 201(b) of the Federal Communications Act, and Other Applicable Law.

Moreover, the fact that AT&T offers the IP new 900 telephone

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5 See In the Matter of Regulatory Policies Concerning Resale & Shared Use of Common Carrier Services & Facilities, 60 F.C.C.2d 261 at paragraph 5 (1976), aff'd sub nom. AT&T v. F.C.C., 572 F.2d 17 (2d Cir. 1977), cert. denied, 439 U.S. 875 (1978).

6 In fact, even if AT&T's reason for terminating the IP's transport services on the IP's existing 900 numbers was the content of the IP's messages, the Federal Communications Act prohibits such termination. National Assn of Broadcasters, 740 F.2d at 1203.

numbers does not make AT&T's act of terminating the IP's existing 900 telephone numbers, when the IP terminates, or when AT&T terminates, billing services just and reasonable.[7] This tactic by AT&T simply is a ruse to avoid its common carrier transport obligations! The FCC should not permit AT&T to terminate communications (i.e., transport) services to the IP's particular 900 numbers for reasons that are not "just and reasonable." To permit such conduct is to make a mockery of the Federal Communications Act's legislative mandate that AT&T provide 900 transport services (including the 900 numbers themselves) to the IP on a "just and reasonable" basis.

In the past, common carriers have attempted to obtain the right to change telephone numbers by including in a tariff the right to change numbers and a statement that subscribers have no property rights to the telephone numbers assigned. However, the FCC has struck down such tariff provisions holding:

> "We find this provision so broad and vague that it would accord the telco unrestricted discretion to change its customers' number assignments. Customers may have significant financial interests in the stability of these assignments.... We also find that the [provision] that customers have no "property rights" in these number assignments is gratuitous[8]

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[7] This argument is bolstered further by AT&T's refusal to provide referral messages on the IP's existing unique 900 telephone numbers after they are terminated by AT&T or the IP. A referral message advises callers that the number has been changed and provides the new number. Without a referral message, callers to all of the IP's AT&T 900 telephone numbers that are terminated would hear a message stating that the numbers are no longer in service. Callers would thereby conclude that the IP is simply no longer in business, or is unable to provide 900 services.

[8] In fact, the tariff language at issue may indeed be "gratuitous." AT&T does not own telephone numbers. The numbers are assigned to

[and] must be deleted."

Matter of Investigation of Access & Divestiture Related Tariffs, 97 F.C.C.2d 1082 (1984).[9] Further, the FCC has said that any tariff limitations that would restrict such rights must be justified by the carrier. In reviewing such tariff language, the FCC has set forth the following standard:

> "It is clear, however, that the prohibitions restrict subscribers' use of their communication service, and that carriers must justify the restrictions as just and reasonable under Section 201(b) of the Communications Act, and the case law based thereon. Also, the restrictions and exceptions thereto are discriminatory, and thereby unlawful if it is determined that the discrimination is unjust and unreasonable under Section 202(a) of the Act. The burden of proof of establishing the justness and reasonableness of the restrictions and discrimination associated therewith is squarely on the carriers in whose tariff the restriction exceptions are found." (Emphasis added.)

Resale & Shared Use, 60 F.C.C.2d 261 at paragraph 4.

Notwithstanding AT&T's knowledge of these FCC decisions, AT&T included both in its Tariff No. 1, and in its BSA, provisions which AT&T knew were anticompetitive and unenforceable; namely § 5.4.2.E. stating that a customer has no "...interest or proprietary right to

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AT&T by Bell Communications Research (known as "Bellcore"), for all telephone numbers in the United States. In the Matter of Provision of Access for 800 Service, 8 F.C.C. Rcd. 1423 at paragraph 19 (1993); In the matter of Competition in the Interstate Interexchange Marketplace, 5 F.C.C. Rcd. 2627 at n.120. Thus, the tariff language may have been inserted to protect AT&T from claims by subscribers as a result of changes made by Bellcore, and not for the purpose of permitting AT&T arbitrarily to revoke telephone numbers, and thereby engage in unjust, unreasonable or discriminatory conduct in violation of the Act.

[9] In that same case, the FCC noted its policy that "customers may use a common carrier's services or facilities as they choose as long as the use (1) is lawful, (2) will not harm the network, and (3) is not otherwise publicly detrimental." (Emphasis added.)

any....900 telephone number", and the last sentence of § 9 of AT&T's BSA which provides:

> "9...upon termination of this Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

AT&T currently continues to contend that:

> "the governing law regarding that issue - the federal tariff - specifically states that... [the IP] has no proprietary or ownership interest whatsoever in any 900 numbers assigned to it. Further,... [the IP] is estopped from denying the reasonableness or appropriateness of that tariff of AT&T's provision by reason of the fact that it has previously acknowledged and agreed, in the [billing services] Agreement, that upon termination of the [billing services] Agreement... [the IP] will not retain the 900 numbers previously assigned to it and will be assigned new 900 numbers."

See page 6, lines 1-7 of AT&T's July 28, 1995 Brief filed in the Las Vegas U.S. District Court, Exhibit A to the accompanying Declaration of David Kahn. Exhibit B thereto is the IP's Reply Brief.

AT&T's changing of the IP's 900 telephone numbers merely because of the termination of billing services for those 900 numbers clearly violates the Federal Communications Act and FCC precedent. The IP has an interest in the 900 numbers assigned to it, which may not be terminated except in very limited circumstances which are not present simply because AT&T's billing services for those 900 numbers are terminated. In short, AT&T has no "just and reasonable" basis whatsoever for the termination of the IP's 900 numbers, thereby terminating transport services on the IP's existing 900 numbers, merely because either party terminates billing services for those 900 numbers pursuant to AT&T's BSA.

In addition, several courts have recognized that the mere statement in a tariff[10] that a customer has no proprietary right in a telephone number can not serve as a basis for a phone company to circumvent its obligations under applicable law. Such a tariff provision has been consistently interpreted by courts to prevent telephone companies from engaging in such conduct, whose sole effect is to harm the subscriber. More specifically, courts have held that a tariff provision (virtually identical to AT&T's MultiQuest 900 Tariff) stating that a user has no ownership right in a telephone number, could not be construed to authorize a telephone company to exercise arbitrary dominion over the telephone number so as to cause harm and injury to another.

For example, in **Shehi v. Southwestern Bell Tel. Co.,** 382 F.2d 627, (10th Cir. 1967), the U.S. Court of Appeals for the Tenth Circuit reasoned that if it were to follow the telephone company's interpretation of the tariff concerning reservation of property rights to the telephone numbers, tariff provisions, such as the transfer of service between subscribers, would be rendered

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10 Nor is the fact that AT&T's BSA also states that the IP has no ownership or other interest in the assigned 900 numbers controlling. AT&T may not by contract alter the rights defined by the tariff. American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818, 819, 823-24 (D.C. Cir. 1980); Maislin Industries U.S. v. Primary Steel, Inc., ___ U.S. ___, 110 S.Ct. 2759, 2766 (1990) (although a case arising under the Interstate Commerce Act, the FCC has considered it appropriate to refer to precedent of the Interstate Commerce Commission. 60 F.C.C.2d 261.) Further, an unfiled or unpublished contractual alteration of a tariff is violative of the Act itself. 643 F.2d at 826. See *also,* Maislin, 110 S.Ct at 2769 (sanctioning adherence to unfiled rates undermines basic structure of the law).

meaningless, and changes in subscriber's numbers could be made at the slightest whim of the company, regardless of the consequences to subscribers. See also, **Price v. South Cent. Bell,** 313 So.2d 184 (Ala. 1975).

In the area of bankruptcy law, the Fifth Circuit in **In re Fountainbleau Hotel Corp.**, 508 Fed. 2d. 1056 (5th Cir. 1975) reh. den. 512 F.2d 1406 stated:

> "Two other circuits have held that the right to use a telephone number does not constitute possession of that number. See In re Best Re-manufacturing Co., 9 Cir. 1971, 453 F.2d 848; Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 2 Cir., 1960, 286 F.2d 488. Both of these cases are extremely brief discussions of the issue, however, and we believe that they should not be followed. They rely heavily on the fact that, as in this case, the telephone company tariffs recited that a subscriber acquires no property rights in a telephone number when he is permitted the use of it. A tariff, however, drafted by the company and certain to be self-serving, cannot determine the meaning of the term "property" in the federal bankruptcy statute. The telephone numbers are a valuable asset, just like the hotel's building or furniture. The purpose of summary jurisdiction is to give the bankruptcy court a quick means of preserving the wherewithal for maintaining the debtor's business. Protecting use of the telephone numbers by the debtor clearly falls within that responsibility." (Emphasis added.)

Thus, the statement in AT&T's 900 tariff (and/or BSA) that the IP has no proprietary interest in its unique 900 numbers is not a basis to permit AT&T to act in violation of the Communications Act and terminate an IP's unique telephone numbers just because either party terminates AT&T's 900 billing services.

H. The IP Has A Very Significant Interest In Its Unique 900 Telephone Numbers.

The FCC and the courts have recognized the substantial interest of a subscriber to telephone service and its assigned

telephone number.[11] For 900 IP's, their particular 900 numbers are typically the single most important asset they possess, and typically generate virtually all of the IP's 900 income.

The reason the IP's 900 telephone numbers generate such revenues is because of the significant investment of past advertising expenditures and associated good will over many years in the past. If the IP's 900 telephone numbers are converted or terminated by AT&T upon AT&T's termination of the IP's BSA, without cause, and AT&T thereby refuses to provide the IP with tariffed transport services on such 900 telephone numbers, the IP will suffer irreparable injury because the IP's 900 business will probably be destroyed since the IP's 900 callers will have no practical way to contact the IP, but instead will call a competitor's 900 telephone number. As a result, the IP's 900 business will most probably not be in existence.

For example, in the case of one of the commentator's companies, MRO Communications, Inc. ("MRO"), the overwhelming majority of MRO's approximately one-hundred thirty 900 numbers have not been advertised for at least two or three years. Even in the absence of additional advertising, MRO's telephone numbers would continue to receive a substantial volume of calls for many years to

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[11] The FCC has ordered that carriers such as AT&T must allow a customer to take its area code 800 numbers with it if it changes long-distance companies. See In the Matter of Provision of Access for 800 Service, 6 F.C.C. Re 5421 (1991). The order became effective May 1, 1993. In the Matter of Provision of Access for 800 Service, 7 F.C.C. Rcd. 8616 (1992). In the 1992 Order, the FCC acknowledged the "significant benefits that number portability can bring to consumers, through heightened 800 service competition and increased choices ..." 6 F.C.C. Rcd. 5421 at paragraph 20.

come! Based on MRO's experience with other similar 900 telephone numbers for which advertising ceased but the 900 number continue to operate, MRO's 900 numbers will continue to receive considerable volumes of calls for many years from cessation of all advertising and promotion of the 900 telephone numbers.

Upon AT&T's termination on thirty days notice, without cause, of the IP's BSA, AT&T will terminate (pursuant to the last sentence of Section 9. of the IP's BSA) transport services on the IP's unique 900 telephone numbers, which typically generate virtually all of the IP's 900 revenue. Unless the 900 IP has essential tariffed transport services on its existing 900 telephone numbers, the IP's 900 business will most probably be destroyed.

Further, unlike 800 numbers, 900 telephone numbers are not yet portable, and therefore cannot easily be transferred from AT&T to another 900 billing company. Thus, the IP remains totally dependent upon AT&T for provision of transmission (i.e., transport) services for its unique 900 telephone numbers. AT&T's termination of the IP's unique 900 telephone numbers significantly and adversely affects the IP's entire substantial past investment of very significant monies in advertising to generate demand for these particular 900 telephone numbers, and will deprive the IP of very substantial revenues from the residual response to such advertising for many years in the future.

AT&T's normal practice pursuant to their illegal exclusive dealing and tying provisions of their BSA (i.e., Sections 8.G. and 9.) is to terminate tariffed transport services on the same 900

numbers when AT&T terminates billing and collection services for those 900 telephone numbers. In other words, upon AT&T's termination, without cause, on thirty days notice of the IP's BSA AT&T will only provide utility services (i.e., tariffed transport services) to the IP for the IP's unique 900 telephone numbers if the 900 IP gives up its single most important asset, its unique 900 telephone numbers!

The IP's unique 900 telephone numbers generate significant revenues because of substantial past advertising expenditures and associated good will. If the IP's 900 telephone numbers are terminated by AT&T, or if AT&T thereby refuses to provide tariffed transport services for such 900 telephone numbers, the IP's 900 business will most probably be destroyed because the IP's 900 callers will have no practical way to immediately contact the IP, but instead will simply call a competitor's 900 telephone number.

The IP's specific 900 telephone numbers, and the tariffed transport services therefore, are critical and essential to the IP's 900 business. More specifically, the loss to the IP of tariffed transport services for the IP's specific 900 telephone numbers results in a loss of the IP's unique property, its customer list, because (1) the IP's 900 numbers are the only means for the IP's customers of those numbers to do business with the IP, and (ii) there is no practical economic way for such customers to contact the 900 IP, a significant number of whom are repeat customers, other than through a referral message on each of the IP's 900 numbers. In order to leave such a referral message, the